82-5328

No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

DONALD WAYNE THOMAS

Petitioner,

-against-

WALTER D. ZANT,
Superintendent
Georgia Diagnostic and
Classification
Center

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

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QUESTIONS PRESENTED

1. Whether petitioner was denied due process of law by the trial court's failure to conduct an evidentiary hearing and make a finding as to his competency to stand trial where the psychiatrists who reported to the court diagnosed petitioner as schizophrenic and were evenly divided in their opinions as to his competency and where there was evidence that petitioner had engaged in bizarre and irrational behavior?

2. Whether instruction of the jury in the bare words of a statute authorizing the death penalty for any murder found to be "outrageously or wantonly vile, horrible or inhuman, in that it involved torture and depravity of mind" satisfied the requirements of the Eighth and Fourteenth Amendments that consideration of the death penalty be guided by clear and objective standards?

3. Whether the Georgia courts have adopted such a broad and vague construction of the terms "torture" and "depravity of mind" in upholding petitioner's sentence of death as to violate the Eighth and Fourteenth Amendments to the Constitution?

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OPINION BELOW

The decision of the Superior Court of Butts County is appended to this petition at 1a. It was not reported. The Supreme Court of Georgia denied an application for a certificate of probable cause to appeal, thereby declining to review the decision of the Superior Court of Butts County. The order of the Georgia Supreme Court denying the application is appended to this petition at 22a.

JURISDICTION

The decision of the Superior Court of Butts County was entered March 10, 1982. Petitioner sought review of the decision by the Supreme Court of Georgia. That court denied an application for probable cause to appeal on June 2, 1982. Appendix at 22a. Said denial of an application for probable cause to appeal operates to deny petitioner any review of the decision of the Superior Court of Butts County by a state court

in Georgia. Jursidiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

This case involves the seventh aggravating circumstance of Georgia's death penalty statute, Ga. Code Ann. § 27-2534.1 (b)(7), which provides for the death penalty where:

> The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

This case also involves Georgia's statute pertaining to one's competence to stand trial, Ga. Code Ann. § 27-1502, which provides:

> (a) Whenever a plea is filed that a defendant in a criminal case is mentally incompetent to stand trial, it shall be the duty of the court to cause the issue of the defendant's mental competency to stand trial to be first tried by a special jury. If the special jury finds the defendant mentally incompetent to stand trial, the court shall retain jurisdiction over the defendant, but shall transfer the defendant to the Department of Human Resources.

(b) Within 90 days after the Department of Human Resources has received actual custody of a person pursuant to subsection (a), such person shall be evaluated and a diagnosis made as to whether the person is presently mentally incompetent to stand trial and if so, whether there is a substantial probability that the person will attain mental competency to stand trial in the foreseeable future. If the person is found to be mentally competent to stand trial, the department shall immediately report that finding and the reasons therefore to the committing court and the person shall be returned to the court as provided in subsection (e).

(c) If the person is found to be mentally incompetent to stand trial by the Department of Human Resources and there is not a substantial probability that the person will attain competency in the forseeable future, the department shall report that finding and the reasons therefore to the committing court and the person, providing that such person meets the criteria for civil commitment, shall thereupon be civilly committed to a State institution . . .

. . .

(e) A person who is found by the Department of Human Resources to be mentally competent to stand trial shall be discharged into the custody of a law enforcement officer of the jurisdiction of the court committing such person to the department, . . .

(f) Any person returned to the court as provided in subsection (e) shall again be entitled to file a special plea hereunder.

STATEMENT OF THE CASE

Donald Wayne Thomas seeks a writ of certiorari from this Court to the Superior Court of Butts County, Georgia, to review a decision of that court denying his application for a writ of habeas corpus.

Mr. Thomas asserted in the court below that he was being wrongfully detained by the respondent pursuant to a conviction of murder and sentence of death which were imposed upon him by the state of Georgia in violation of rights guaranteed by

the Constitution of the United States, and asked that court to vacate his conviction and sentence. He alleged, inter alia, that he was denied due process by the failure of the trial court to determine his competency prior to trial, that the discretion of the jury that sentenced him to death was not properly guided by the trial court, and that he was sentenced to death under a vague and overbroad construction of the aggravating circumstance set out in Ga. Code Ann. § 27-2534.1 (b)(7), which provides for the death penalty where the offense of murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

The Superior Court of Butts County denied the application for a writ of habeas corpus, App. at 1a, and the Supreme Court of Georgia declined to review the decision. App. at 22a.

The petitioner, a 19-year-old black male with a ninth grade education, was convicted of murder on October 24, 1979, following a jury trial. That same day, the jury recommended that petitioner be sentenced to death. On October 25, 1979, the trial court issued an Order of Execution. R. 119. 1/

From the outset, there was a question as to the competency of the petitioner to stand trial. Within three weeks of petitioner's indictment, the trial court ordered him examined by the psychiatric staff at Grady Memorial Hospital "for the purpose of determining whether or not he is capable of standing

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1/ "Tr." refers to the transcript of petitioner's trial in the Fulton Superior Court. "R." refers to the record on appeal in the direct appeal of his conviction to the Georgia Supreme Court. Both were made a part of the record in the court below. "HC" refers to the transcript of the hearing on the petition for a writ of habeas corpus before the Butts County Superior Court on February 11, 1982.

trial and participating in his own defense, and, whether or not Defendant was mentally competent at the time of the alleged offense or offenses." R. 5.

Donald Thomas was examined by three psychiatrists prior to trial.[2/] One found that he "had no idea of the month or day," his speech was "characterized by tangential to loose associations," his affect was "markedly flattened" and his mood "depressed." The doctor reported that during the examination the petitioner "became increasingly restless and agitated, eventually ceasing to respond to questions while rocking back and forth in the chair and rubbing his genitals with his hands." He found symptoms "clearly indicative of a diagnosis of schizophrenia" and concluded that petitioner was "so substantially impaired as a result of psychiatric symptions as to be unable to assist his attorney in the preparation and implementation of his defense." App. at 23a-24a.

The second psychiatrist who examined petitioner was unable to make a definite diagnosis or state an opinion as to his competency to stand trial. App. at 25a-26a. A third report, received from Central State Hospital, indicated that petitioner was "partially oriented," of "borderline" intelligence, and suffering from a "thought disorder, which resembles that of a schizophrenic process," but contained the opinion that he was competent to stand trial. App. at 27a-28a.

Petitioner's court-appointed lawyer testified at the habeas corpus proceeding that he had experienced difficulty communicating with his client. HC at 56. Counsel also testified that petitioner sat throughout trial with his

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2/ Three reports were received by the trial court regarding competency and made a part of the record. The reports are included in the appendix to this petition at 23a-28a.

right armed raised and his fist clenched and that he was unable to persuade his client to refrain from this inappropriate behavior. HC at 60-61.

Despite the conflicting opinions as to the petitioner's competency and the inappropriate behavior of the petitioner at trial, no evidentiary hearing on competency was ever held. Nor were there any judicial findings as to the competency of petitioner to stand trial.

Petitioner was convicted of the murder of a 9-year-old child, whose body was found on some railroad tracks near where petitioner lived. The State linked petitioner to the killing through the testimony of two witnesses, petitioner's fifteen-year-old retarded girlfriend and his alcoholic stepfather, both of whom testified that petitioner had admitted the killing to them. Tr. 352, 390. The stepfather recanted his testimony at the hearing on the petition for a writ of habeas corpus, and said that he testified falsely at trial because he had been jailed right before trial, was suffering from withdrawal from alcohol, and was afraid. HC at 219-226.

The State served notice of its intention to seek the death penalty on the first day of trial, indicating that it would attempt to prove that petitioner committed the offense under aggravating circumstances set out in Ga. Code Ann. Section 27-2534.1 (b)(7): "The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind."

The only evidence introduced at the sentencing hearing was petitioner's prior convictions for child molestation and aggravated assault with intent to rape offered by the State. Tr. 557-58. In instructing the jury on the aggravating circumstance, the court stated:

> In this case the state contends that the offense of murder for which the accused has been convicted was outrageously and wantonly vile, horrible and inhuman, in that it involved torture and depravity of mind.
>
> Such a circumstance is defined as a statutory aggravated circumstance under the law of this state.

Tr. at 565-566. The jury was not instructed as to what evidence it could properly consider in determining whether the statutory aggravating circumstance had been proven. And it was not given any limiting instruction with regard to its consideration of petitioner's prior convictions.

The jury recommended that Mr. Thomas be sentenced to death and the trial court sentenced him to death in the electric chair. 3/

HOW THE FEDERAL QUESTIONS WERE PRESENTED AND DECIDED BELOW

Petitioner alleged in paragraphs 9-15 of his petition for a writ of habeas corpus that the failure of the trial court to resolve conflicting psychiatric opinion regarding petitioner's competency offended petitioner's right to due process of law guaranteed by the Fourteenth Amendment to the Constitution. Petitioner submitted a written memorandum of law in support of this contention prior to the hearing on his petition. The Superior Court of Butts County held that the trial of the petitioner

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3/ The Georgia Supreme Court affirmed petitioner's conviction. Thomas v. State, 245 Ga. 668, 266 S.E.2d 499 (1980). This Court vacated the judgment of the Georgia Supreme Court and remanded the case for further consideration in light of Godfrey v. Georgia, 446 U.S. 420 (1980). Thomas v. Georgia, 449 U.S. 988 (1980). On remand, the Georgia Supreme Court reinstated the death sentence. Thomas v. State, 247 Ga. 234, 275 S.E.2d 318 (1981), cert. denied, ___ U.S. ___, 69 L.Ed.2d 984 (1981).

without an evidentiary hearing to determine competency did not violate the due process clause as interpreted by this Court in Pate v. Robinson, 383 U.S. 375 (1966). Op. at 7-9, App. at 7a-9a. The Court concluded that the conflicting reports did not create a "bona fide doubt as to his competency." Although there was testimony by petitioner's trial counsel that petitioner sat with his arm raised and his fist clenched throughout the trial, the court concluded that Petitioner "presented no evidence to indicate his demeanor at trial created any suspicion of mental illness." App. at 9a.

In paragraphs 39-45 of his petition, petitioner asserted that instruction of the jury in the bare words of the statute authorizing death if the murder was "outrageously and wantonly vile, horrible and inhuman in that it involved torture and depravity of mind" did not provide sufficient guidance for consideration of the death penalty and therfore offended the Eighth and Fourteenth Amendments to the Constitution.[4/] The Superior

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4/ Before trial petitioner challenged the validity and application of the aggravating circumstance because it allowed the jury subjective discretion in considering the death penalty in violation of Furman v. Georgia, 408 U.S. 238 (1972), and the Eighth and Fourteenth Amendments to the Constitution. He also contended that the absence of an objective standard for finding aggravating circumstances eliminated the ability of the Georgia Supreme Court to review effectively his death sentence as required by Ga. Code Ann. §27-2537 and the due process clause of the Fourteenth Amendment. Prior to the penalty phase, petitioner again stated his objection to the lack of an objective standard for finding aggravating circumstances which would permit the imposition of the death penalty:

> I would further reraise my objection to the notice of statutory aggravating circumstances served upon me, and that is 27-2534.1 parenthesis 7, on the grounds that it's vague and has no objective standard to be applied in deciding whether that statutory aggravating circumstance exists.

Tr. at 550.

Court of Butts County rejected this contention, finding that the Georgia Supreme Court had upheld the aggravating circumstance on remand, Thomas v. State, 247 Ga. 234, 275 S.E.2d 318 (1981), and that "[i]mplicit in this finding is the conclusion that the jury charge sufficiently channeled the jury's discretion . . . ." App. at 20a.

In paragraphs 46-49 of the petition it was asserted that the terms "torture" and "depravity of mind" were applied in a vague and overbroad manner in violation of the Eighth and Fourteenth Amendments to the Constitution. The Superior Court of Butts County rejected that assertion on the basis of the Georgia Supreme Court's opinion on remand in petitioner's direct appeal:

> Contrary to Petitioner's assertion, the [Georgia] Supreme Court has already concluded the (b)(7) aggravating circumstance was properly applied. Thomas v. State, Addendum, 247, Ga. at 234.

App. at 21a. On remand from this Court, the Georgia Supreme Court, in reinstating petitioner's death sentence, had concluded that because of evidence that petitioner had admitted beating the decedent with a stick and choking him, the jury could find serious physical abuse, and because of petitioner's prior convictions for child molestation and assault with intent to rape, it could infer that the decedent had been sexually abused. Thomas v. State, supra, 275 S.E.2d at 319.

REASONS FOR GRANTING THE WRIT

For the reasons which follow, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

I. THE FAILURE OF THE GEORGIA SUPREME COURT TO FIND THAT AN EVIDENTIARY HEARING WAS REQUIRED WHERE THERE WAS SUBSTANTIAL EVIDENCE OF THE PETITIONER'S INCOMPETENCY CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT, OTHER STATE COURTS OF LAST RESORT AND FEDERAL COURTS OF APPEAL.

Despite information before the trial court which raised a substantial question as to petitioner's competency to stand trial, that court failed to conduct an evidentiary hearing and make a determination of petitioner's competency to understand the proceedings against him and properly assist in his own defense.

The trial court received three psychiatric reports before trial which were evenly divided in the opinions they contained as to petitioner's competency. The reports indicated that petitioner suffered from schizophrenia, had difficulty communicating, was at best only "partially oriented," and was of "borderline" intelligence.5/ At trial, the court heard evidence of bizzare and irrational behavior on the part of the petitioner in locking his girlfriend in a room for a week, showing her the body of the decedent and then jumping on the body.6/ At the habeas corpus hearing there was evidence that counsel had difficulty communicating with his client and that petitioner exhibited inappropriate behavior at trial.7/

The conclusion of the Court below that a competency hearing was not required by this evidence constitutes a marked departure from

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5/ The three reports appear in the appendix to this brief at 23a-28a.

6/ Tr. at 352, 375-377.

7/ HC at 56, 60-61.

the holdings of this Court, state courts of last resort, and federal courts of appeal. Therefore, this Court should issue a writ of certiorari to review the decision of the court below.

This Court has made it clear that "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." Drope v. Missouri, 420 U.S. 162, 172 (1975), citing Pate v. Robinson, 383 U.S. 375, 378 (1966). See also Bishop v. United States, 350 U.S. 961 (1956) reversing 96 U.S. App. D.C. 117, 120, 223 F.2d 582, 585 (1955). In both Drope and Robinson this Court, although finding that state statutory schemes "jealously guarded" this right,8/ reversed convictions because of the failure of trial courts to utilize adequate procedures once a question as to the competency of the defendant was raised. The Court pointed to three factors -- evidence of a defendant's irrational behavior, any medical opinions on competence, and a defendant's demeanor at trial -- as being relevant to determining whether further inquiry is required and stated that "even one of these factors standing alone may, in some circumstances, be sufficient." Drope, supra at 180.9/

8/ Robinson, supra at 385, Drope, supra at 173.

9/ In Robinson, this Court found that a history of irrational behavior was sufficient to warrant an evidentiary hearing despite the stipulated opinion of a psychiatrist that the defendant knew the nature of the charges and could cooperate with his attorney and the fact that he appeared mentally alert during trial. 383 U.S. at 385-86. In Drope, this Court held that irrational behavior by the defendant prior to trial, a suicide attempt during trial and the suggestion of a psychiatrist and the defendant's lawyer that he needed psychiatric treatment created a sufficient doubt of his competency to stand trial to require further inquiry by the trial court. 420 U.S. at 180.

Where there is conflicting documentary evidence on the question of competency, an evidentiary hearing is required. In Bishop v. United States, supra, this Court reviewed a decision by the Court of Appeals for the District of Columbia Circuit sustaining a determination of a competency question without a hearing on the information before the trial court, including a detailed report of a psychiatrist. See 96 U.S. App. D.C. at 120-121, 223 F.2d at 585-86. In a per curiam decision, this Court vacated the judgment and remanded the case for a hearing on competency. 350 U.S. at 961. In addition, an evidentiary hearing is also necessary, as the Court of Appeals of Oregon has pointed out, to protect other fundamental rights of the accused, such as the rights of cross-examination and confrontation. Brady v. Calloway, 11 Or. App. 30, 36, 501 P.2d 72, 75 (1972).10/

Accordingly, state and federal courts have held that an evidentiary hearing is constitutionally required when the information before the trial court is sufficient to raise doubt as to the competency of the defendant to stand trial. Osborne v. Thompson, 610 F.2d 461, 462 (6th Cir. 1979); Fitch v. Estelle, 587 F.2d 773, 777 (5th Cir.), cert. denied, ___ U.S. ___, 100 S.Ct. 170 (1979); Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972); Rhay v. White, 385 F.2d 883 (9th Cir. 1967); Commonwealth v. Hill. 375 N.E.2d 1168 (Mass. 1978); State v. Spivey, 65 N.J. 21, 37, 319 A.2d 461, 469 (1974); People v. Pennington, 66 Cal.2d 508, 518-19, 58 Cal. Rptr. 374, 381, 426 P.2d 942, 949 (1967); State v. Jensen,

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10/ It is well established that a trial court cannot delegate its responsibility to the state hospital to determine the competency of a defendant. "Like criminal responsibility, incompetency is a legal question; the ultimate responsibility for its determination must rest in a judicial rather than a medical authority. . . . " Note, Incompetency to Stand Trial. 81 Harv.L.Rev. 454, 470 (1976). The commentator also points out that "there is repeated evidence that psychiatrists often misunderstand the test of incompetency . . . . Medical opinion about the defendant's condition should be only one of the factors relevant to a determination." Id. [footnotes omitted.]

278 Minn. 212, 153 N.W.2d 339 (1967). Other courts have protected the right to a determination of competency by rigorously enforcing state statutes requiring evidentiary hearings without reaching the constitutional question. See, e.g., People v. Livingston, 57 Mich. App. 726, ___, 226 N.W.2d 704, 709 (1975), where the court reiterated that "the trial judge must announce, on the record, the commencement of a formal evidentiary hearing into the question of competency" regardless of whether a hearing is requested.11/

Thus, once the evidence before the trial court is sufficient to raise a reasonable doubt as to competency, the trial court must conduct an evidentiary hearing to resolve the issue.

> [A] due process evidentiary hearing is constitutionally compelled at any time that there is "substantial evidence" that the defendant may be mentally incompetent to stand trial. . . . Evidence is "substantial" if it raises a reasonable doubt about the defendant's competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence. The function of the trial court . . . is not to determine the ultimate issue: Is the defendant competent to stand trial? It [sic] sole function is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency. At any time that such evidence appears, the trial court sua sponte must order an evidentiary hearing on the competency issue. . . .

Moore v. United States, supra at 666. In People v. Pennington, supra, the California Supreme Court held in light of Pate v. Robinson, supra, that its previous interpretation of that state's penal code, which permitted a trial court to resolve conflicting evidence to decide if there was a doubt as to the competency of a defendant, was unconstitutional as applied to a defendant who

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11/ But see also State v. Jemison, 14 Ohio St.2d 47, 236 N.E.2d 538, 540 cert. denied, 393 U.S. 943 (1968), where in interpreting an Ohio statute the court approved of referral to the state hospital to determine the issue of competency without an evidentiary hearing.

presented substantial evidence of incompetence. People v. Pennington, supra, 66 Cal.2d at 516-17, 58 Cal. Rptr. at 380, 426 P.2d at 948-49, revising its decision in People v. Merkouris, 52 Cal.2d 672, 344 P.2d 1, cert. denied, 361 U.S. 943 (1960).

The failure of the Georgia courts to require a competency hearing in this case is in conflict with these decisions.12/ There was not only sufficient evidence to create a reasonable doubt as to the petitioner's competency, there was an even division in the opinions of the experts as to petitioner's competency. The opinion of one psychiatrist that petitioner was unable to assist his attorney provided a stronger indication of incompetency than was before the trial courts in either Robinson or Drope.13/ But of course it did not stand alone. One doctor was unable to reach a conclusion as to diagnosis and competency, the report from the state hospital raised serious questions about the mental health of petitioner, there was evidence at trial of irrational and bizzare behavior on the part of the petitioner, and there was unusual

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12/ Although Georgia Code Section 27-1502(a) provides for a trial on the issue of competency before a "special jury," no such trial was conducted by the trial court below. This was apparently because the prosecution did not object to transfer of the petitioner to the Department of Human Resources, thereby obviating the need for a finding of incompetency by a special jury to accomplish the transfer as provided in Section 27-1502(a). Subsections (b) and (e) of the statute provide for the return of a person transferred to the Department to the court upon a determination of competency by the Department. Subsection (f) of the statute provides that after return to the court, a person is entitled to again file a special plea of incompetency under the statute. The statute is set out on pages 2-3 of this petition.

13/ In neither Robinson nor Drope did the trial court have before it an expert opinion of incompetency. While in those cases there appeared to be sufficient indicia of mental instability to require further inquiry, here the evenly divided opinions of the psychiatrists who examined petitioner squarely presented an issue for resolution to the trial court.

behavior on the part of petitioner at trial.14/

Therefore petitioner respectfully submits that the Georgia courts have failed to protect his right not to be tried or convicted while incompetent in violation of the due process guarantee of the Fourteenth Amendment. Because of the importance of the departure by the Georgia courts from the authorities cited herein in the context of this death penalty case, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

14/ Indeed, the fact that the trial court entered an order stating that "the defendant may be presently incompetert to participate in his defense" and its transfer of petitioner to the state hospital indicates that the court recognized the substantial evidence of incompetency, and, therefore, it was required to conduct an evidentiary hearing. See, Tillery v. Eyman, 492 F.2d 1056, 1059-60 (9th Cir. 1974) (Sweigert, J. concurring).

II. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF THIS COURT REQUIRING THAT CONSIDERATION OF THE DEATH PENALTY BE GUIDED BY CLEAR AND OBJECTIVE STANDARDS.

Petitioner's jury was instructed that it could impose the death penalty pursuant to Ga. Code Ann. Section 27-2534.1(b)(7) if it found that the offense of murder was "outrageously and wantonly vile, horrible or inhuman in that it involved torture and depravity of mind." Tr. at 565-566, App. at 29a-30a. The jury was provided with no definition of "torture" or any other terms of (b)(7) in the trial court's instructions. Nor was it instructed as to the limited purposes for which petitioner's prior convictions for child molestation and assault with intent to rape were admitted, assuming that those convictions were properly admitted at the sentencing hearing.15/

The jury in returning its sentence of death made no specific findings of fact, but merely parroted the language of the statute which had been quoted to them by the trial court. Thus, as in Godfrey v. Georgia, 446 U.S. 420 (1980), the trial judge's sentencing instructions "gave the jury no guidance concerning the meaning of any of Section (b)(7)'s terms. In fact, the jury's interpretation of Section (b)(7) can only be the subject of sheer speculation." Id., at 429 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.).

15/ Prior convictions provide no basis for imposing the death penalty pursuant to section (b)(7). Although such convictions might be properly admitted in rebuttal of evidence of mitigation or to impeach the credibility of the defendant if he testified, no evidence of mitigation was offered on behalf of petitioner and he did not testify. Thus, it appears that the prior convictions were not properly admitted at petitioner's sentencing hearing. But see Gates v. State, 244 Ga. 587, 261 S.E.2d 349 (1979).

Although this Court vacated petitioner's death sentence and remanded his case for further consideration in light of Godfrey,16/ the Georgia Supreme Court on remand reimposed the death penalty. It held that subsection (b)(7) was properly applied to the facts of the case. Thomas v. State, supra, 275 S.E.2d at 319. Petitioner moved the Georgia Supreme Court for the opportunity to brief the issue of whether he was entitled to a new sentencing hearing because the discretion of the jury that sentenced him to die was not properly guided. However, the Court did not permit briefing and did not address that issue in its opinion. The Superior Court of Butts County in considering this claim below rejected it based upon the decision of the Georgia Supreme Court on remand. App. at 20a.

Thus, this case presents an important constitutional issue left unanswered by Godfrey: whether instructing the jury in the bare words of such a vague statute provides sufficient guidance as required by the Eighth and Fourteenth Amendments in considering the penalty of death.

Mr. Justice Marshall addressed the issue in his concurrence in Godfrey, expressing the view that only a properly instructed jury may impose the sentence of death:17/

> The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards. . . . To give the jury an instruction in the form of the bare words of the statute -- words that are hopelessly ambiguous and could be understood to apply to any murder . . . -- would effectively grant it unbridled discretion to impose the death penalty.

446 U.S. at 437 (Marshall, J., concurring). See also Davis v.

16/ Thomas v. Georgia, 449 U.S. 988 (1980).

17/ Under Ga. Code Ann. Sections 26-3102, 27-2503(b) the sentencing authority in death cases is the jury.

Georgia, 451 U.S. 921 (1981) (Marshall, J., dissenting from denial of certiorari); Hill v. Georgia, 451 U.S. 923 (1981) (Marshall, J., dissenting from denial of certiorari); Willis v. Balkcom, 451 U.S. 926 (1981) (Marshall, J., dissenting from denial of certiorari). The exercise of such unbridled discretion cannot be salvaged by appellate review. Here, as in Godfrey, "the standardless and unchanneled imposition of the death sentences in the uncontrolled discretion of a basically uninstructed jury . . . was in no way cured by the affirmance of those sentences by the Georgia Supreme Court." 446 U.S. at 429 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). As Mr. Justice Marshall stated:

> Such a defect could not be cured by the post hoc narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.

446 U.S. at 437 (Marshall, J., concurring).

The Georgia Supreme Court's speculation as to what the jury did find, what it could have found and what it was authorized to find based upon its review of a cold record is, therefore, inconsistent with this Court's opinions in Godfrey, Gregg v. Georgia, 428 U.S. 153 (1976) and Furman v. Georgia, 408 U.S. 238 (1972). See also Presnell v. Georgia, 439 U.S. 14 (1979); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91-92 (1965). Because of the importance of this issue in the review of death penalty cases, this Court should grant certiorari to review the decision of the Georgia Supreme Court.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE GEORGIA SUPREME COURT EMPLOYED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE WORDS "TORTURE" AND "DEPRAVITY OF MIND" IN UPHOLDING PETITIONER'S DEATH SENTENCE AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

Petitioner's sentence of death rests upon a finding that the offense of murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." This aggravating circumstance is set out in Georgia Code Ann. Section 27-2534.1(b)(7).18/ In Gregg v. Georgia, supra, this Court held that the statutory aggravating circumstance contained in section (b)(7) was not unconstitutional on its face, but warned that it should not be given "an open-ended construction." Id. at 201 (opinion of Stewart, Powell and Stevens, JJ.). In Godfrey v. Georgia, supra, this Court reversed a decision of the Georgia Supreme Court where it had failed to apply in that case a narrow construction of section (b)(7) necessary to avoid the arbitrary and capricious infliction of the death sentence.

Despite the teaching of Gregg, Godfrey and Furman v. Georgia, supra, the Georgia Supreme Court upon remand of this case for further consideration in light of Godfrey, defined and construed the terms of (b)(7) in such a way as to apply those terms to any assault of lethal magnitude. The question of whether the Georgia courts are properly following Godfrey presents an important consitutional issue which should be settled by this Court. Therefore, a writ of certiorari should issue to review the decision below.

18/ Ga. Code Ann. Section 27-2534.1(b)(7) provides that the death penalty may be imposed if "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Petitioner's jury was not instructed with regard to aggravated battery.

In reaffirming the death penalty, the Georgia Supreme Court held that the jury was authorized to find torture because of serious physical and sexual abuse of the victim. It based its finding of serious physical abuse upon the fact that petitioner admitted that he killed the decedent by "beating him with a stick and choking him to death." 275 S.E.2d at 319. The only evidence as to the circumstances of death were provided by petitioner's fifteen-year-old girlfriend, who related the admission in her testimony, and the medical examiner. The medical examiner found antemortem bruises to the neck caused by strangulation which was the cause of death. Tr. 434, 435, 441. He also found two lacerations on the top of the head and minor bruises and abrasions on the arms and chest of the decedent. Tr. at 433. There was no testimony as to whether these injuries were sustained before or after death, although it appears from the testimony that some were postmortem. Tr. at 441. Thus, there was no evidence to suggest that the decedent was subject to prolonged physical abuse or pain prior to death which would authorize a finding beyond a reasonable doubt of torture.19/

The Georgia Supreme Court based its finding of serious sexual abuse upon the petitioner's prior convictions for sex offenses and the fact that the pants of the decedent were partially removed when the body was discovered. This finding of sexual abuse was not made by the trial judge in his report to the Georgia Supreme Court20/ and was only suggested as a possible motive by the prosecutor at

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19/ As this Court observed in Godfrey, supra, the Georgia court has held that "'Torture' must be construed in pari materia with 'aggravated battery' so as to require evidence of serious physical abuse of the victim before death." Id. at 431 [emphasis added]. See also Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980) cert. denied, ___ U.S. ___, 66 L.Ed.2d 611 (1981). In his report to the Georgia Supreme Court, the trial judge expressed his view that the death penalty was appropriate because of "Unexplained strangulation of a 9-year old child; brutality of child's corpse." Report of Trial Judge at 6. Supplemental R. 6. [Emphasis added].

20/ The trial judge reported to the Georgia Supreme Court that the murder was "unexplained." Report of Trial Judge at 6, Supplemental R. 6.

trial.21/ There was no forensic evidence of sexual abuse of the decedent. The petitioner's girlfriend, who testified that petitioner showed her the corpse, did not testify that the pants were partially removed when she saw the body. Finally it should be noted that petitioner's prior convictions provide no basis for either the jury or the Georgia Supreme Court to infer that the crime was committed in a certain manner.22/ The fact the Georgia Supreme Court found this to be a basis upon which the jury could have found sexual abuse beyond a reasonable doubt aptly demonstrates the failure of that court to employ a proper, narrow construction of the terms of section (b)(7).

Thus, the Georgia Supreme Court, in reviewing the sentence of death in petitioner's case on direct appeal, applied a construction of the term "torture" which is so overly broad as to encompass any assault of lethal magnitude. As Mr. Justice Marshall pointed out in his concurrence in Godfrey:

> The Georgia court has given an extraordinarily broad meaning to the word "torture." Under that court's view, "torture" may be present whenever the victim suffered pain or anticipated the prospect of death. . . . That interpretation would of course enable a jury to find a Section (b)(7) aggravating circumstance in most murder cases.

Godfrey v. Georgia, supra at 441 n. 12 (Marshall, J., concurring). In petitioner's case and other cases considered in light of Godfrey, the Georgia Supreme Court has continued to apply such an

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21/ In her closing argument the prosecutor, after observing that she was not required to prove any motive but suggesting that the motive may have been sexual molestation, stated: "You can accept it or reject it. It may even have been a thrill killing. . . . He may have killed for the way he looked." Tr. at 510-511.

22/ The principle that "'the doing of one act is in itself no evidence that the same or a like act was again done by the same person' has been so often judicially repeated that it is commonplace." 1 Wigmore, Evidence Section 192 at 642 (3d ed. 1940) [citations omitted]; McCormick, Evidence Section 157 (2d ed. 1972); 1 Underhill, Criminal Evidence Sections 205-12 (5th ed. 1956); Drew v. United States, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964).

extraordinarily broad meaning to the word "torture" in upholding death sentences under section (b)(7). See, e.g., Mulligan v. State, 245 Ga. 881, 268 S.E.2d 351 (1980), cert. denied, 449 U.S. 986 (1980) (where decedent shot four times and first shot was not fatal, jury was authorized to find serious physical abuse constituting torture prior to death); Brooks v. State, 246 Ga. 262, 271 S.E.2d 172, 173 (1980), cert. denied, 451 U.S. 921 (1981) (where decedent shot once in neck and died within two hours, jury authorized to find torture because death not instantaneous); Baker v. State, ___ Ga. ___, 272 S.E.2d 61, 62 (1980), cert. denied, 450 U.S. 936 (1981) (where victim struck with a whiskey bottle and shot three times in the chest, jury authorized to find torture).23/

The Georgia Supreme Court's treatment of the (b)(7) issue here provides "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, supra at 433 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). Because the Georgia court's construction of (b)(7) raises an important constitutional issue which should be settled by this Court, a writ of certiorari should issue to review that court's decision.

23/ Thus, the Georgia Supreme Court has failed to limit (b)(7) to cases such as McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974) and House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), as anticipated by the prevailing opinions in Gregg and Godfrey. Gregg, supra at 201 (opinion of Stewart, Powell and Stevens, JJ.); Godfrey, supra at 429-30 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). (In McCorquodale, the victim suffered prolonged torture in which she was beaten, burned, bitten, cut with a razor and scissors, sodomized, raped, and subjected to salt being placed in her wounds and hot wax dripped over her body before she was strangled and killed. In House, two seven year old boys were choked to death after each had been forced to submit to anal sodomy.) The Georgia court's cursory treatment of (b)(7) in petitioner's case and other cases indicates that it has not properly limited (b)(7) to a few cases like McCorquodale and House.

CONCLUSION

For the reasons stated herein, Donald Wayne Thomas asks that a writ of certiorari issue to review the decision of the court below.

Respectfully submitted,

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